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NCPA Comments on Second 15-day Language

Additional submitted attachment is included below.

BEFORE THE CALIFORNIA ENERGY COMMISSION

In the matter of: **Amendments to Regulations Specifying Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities**	**Docket No. 16-RPS-03**

NORTHERN CALIFORNIA POWER AGENCY COMMENTS ON SECOND 15-DAY LANGUAGE

The Northern California Power Agency (NCPA)[1] offers these comments to the California Energy Commission (CEC or Commission) on the *Second 15-Day Language*, issued August 18, 2020, to the *Modification of Regulations Specifying Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities* (Proposed Amendments).

I. INTRODUCTION

The *Second 15-Day Language* includes significant substantive changes to the Proposed Amendments that would unlawfully delegate to Commission staff considerable discretion to make determinations regarding the sufficiency of publicly owned utilities (POUs) long-term contracts based on the existence or absence of information wholly outside the scope of the authorizing legislation. These changes would undermine regulatory certainty, have a material impact on POU reporting, and jeopardize investments in renewable resources. As noted in the August 21, 2020 Joint Letter from NCPA, the Southern California Public Power Authority, and the California Municipal Utilities Association, NCPA has grave concerns with the scope and timing of the latest revisions.[2] The *Second 15-day Language* would undermine market stability, create regulatory uncertainty, and allow the Commission to supplant its own judgment about

[1] NCPA is a not-for-profit Joint Powers Agency, whose members include the cities of Alameda, Biggs, Gridley, Healdsburg, Lodi, Lompoc, Palo Alto, Redding, Roseville, Santa Clara, and Ukiah, as well as the Bay Area Rapid Transit District, Port of Oakland, and the Truckee Donner Public Utility District, and whose Associate Member is the Plumas-Sierra Rural Electric Cooperative.

[2] Letter from California Municipal Utilities Association, Northern California Power Agency, and Southern California Public Power Authority, dated August 21, 2020; file:///C:/Users/CSB/Downloads/TN234413_20200821T154411_CMUA,%20NCPA,%20and%20SCPPA%20Comments%20-%20on%20Second%2015-Day%20Language%20Modifications%20to.pdf

contract provisions for that of the contracting parties. Making these proposed changes even more problematic is their inclusion in the proposed amendments at the very end of a years-long rulemaking process, compromising the ability of stakeholder to meaningfully engage with the Commission on these provisions.

At issue is the extent to which the Commission can mandate arbitrary and capricious contract provisions under the auspice of implementing a legislative mandate that addresses only the *duration* of a renewable energy contract. As more fully explained herein, NCPA is concerned with the Commission's attempt to require the POUs to provide certain information to the Commission that is unduly burdensome, not relevant or mandated by the authorizing legislation, and creates the potential for underground regulations in violation of state law. Furthermore, the additional proposed text includes no timelines or parameters around the Commission's review of submitted documents or determination of the long-term nature of the agreements at issue, which could have significant adverse impacts on POUs by jeopardizing RPS compliance and increasing costs to ratepayers. NCPA urges the Commission to reject the newly proposed provisions and address these concerns.

Additionally, NCPA is disappointed that the Commission has not utilized the *Second 15-Day Language* to correct the proposed amendments as it pertains to the treatment of natural gas fired generation covered by the provisions of PUC section 399.33 (Senate Bill 1110 (Stats. 2018, ch. 605). These provisions apply to a very limited number of generation facilities and were adopted for the express purpose of protecting ratepayer investments in facilities built to address reliability needs. As was demonstrated during the recent heatwave and ensuing rolling blackouts, reliable electricity is paramount to the state's residents and business, and the Commission should ensure that section 399.33 is implemented consistent with the legislative intent.

In addition to these comments, NCPA is a signatory to the Comments of the Joint Publicly Owned Utilities on the Second 15-Day Language (Joint POU Comments); NCPA urges the Commission carefully consider the issues raised in those comments and herein, and make the necessary corrections.

II. SUMMARY OF RECOMMENDATIONS AND NECESSARY REVISIONS

- The *Second 15-day Language* regarding the scope of the Commission's review of a POU's long-term agreements exceeds the statutory authority set forth in PUC section 399.13(b), is unlawful and should be withdrawn;

- The Commission must reject proposed changes to the RPS Regulation that authorizes Commission review of POU long-term contract eligibility for anything other than the duration of the agreements or ownership arrangements;

- The Commission must remove proposed provisions that would require POUs to provide documentation regarding specific pricing or delivery requirements for purposes of determining whether the agreement meets the long-term requirements of PUC section 399.13(b);

- The Commission must remove proposed language that would require POUs to provide information that demonstrates how a POU's long-term contract promotes financing, major capital investments, or market stability;

- The Commission must include definitive timelines for the review of long-term contracts submitted with annual reports, and a determination of eligibility;

- The RPS Regulations must confirm that a Commission determination of eligibility as a long-term commitment is not subject to re-review unless the duration of the agreement is amended or modified;
- The RPS Regulations should be modified to ensure that the statutory protections in PUC section 399.33 are properly implemented to allow adjustments to reflect annual capacity factors for the affected generation facilities;
- The Commission should incorporate the proposed revisions to section 3204(d) as set forth in the Joint POU Comments.

III. COMMENTS ON *SECOND 15-DAY LANGUAGE*

Should the *Second 15-day Language* be adopted, the result will be Commission authority to review long-term contract eligibility by assessing factors other than the duration of the agreement, without any parameters or definitions to guide the Commission's review of the agreements. To be clear, NCPA does not dispute the Commission's authority to review POU contracts for eligibility with the RPS programs requirements. For long-term contracts, however, that review should be limited to the statutory mandate that the contracts be for a duration of 10 years or more. Should the Commission – as part of a meaningful discussion and transparent stakeholder process – determine that it would be appropriate to review anything other than the

duration of an agreement to make the long-term determination (such as the delivery and pricing provisions of the agreement), the regulations must identify those provisions and define the parameters around what would be deemed "acceptable." As drafted, the regulation is completely devoid of such information, rendering Commission review of other contract terms, such as delivery and pricing terms, completely arbitrary and capricious. This denies stakeholders the opportunity to participate in the public process to develop such parameters, and would make it impossible for POUs to know what pricing and delivery terms would be acceptable. The concerns with the addition of these problematic provisions are compounded by their last-minute emergence in a rulemaking process that has been underway for more than four years.

The RPS program plays an important role in the context of the state energy policy. That role, however, is but one element of the broader electricity markets, and overall POU energy procurement program. The Commission's role in enforcement of the RPS program is not to supplant its own judgment for that of the POUs, but rather to enforce clearly defined and articulated rules authorized by statute. What is proposed in the *Second 15-day Language* would enable the Commission – and individual reviewing staff – to arbitrarily impose additional contract provisions on POUs, which undermines all notions of regulatory certainty, and does nothing to advance the underlying objectives of the RPS program. As discussed below, the Commission must act to rectify these shortcomings.

A. The Scope of the Proposed *Second 15-Day Language* is Not Properly Addressed This Late in the Rulemaking Process

One of the most troubling aspects of the *Second 15-day Language* is the timing. The proposed modifications would add extensive, and often times onerous, reporting and data-production requirements that warrant careful and considerate review by the stakeholders in the public process. Such review should have – and could have – been undertaken any time during the 4+ year process leading up to the release of the formal 45-day language on May 7, 2020 (Proposed Amendments). Instead, these substantive changes were released with the very last set of proposed changes, without the benefit of previous iterations or a staff assessment to inform the process. The statutory provisions being implemented in the Proposed Amendments to the RPS Regulation were adopted by the legislature several years ago. This rulemaking has been going on for over four years, during which time Staff Papers and pre-rulemakings drafts of the

proposed regulation have been shared. Yet, the additional contract requirements that would be mandated by the *Second 15-Day Language* were not introduced for the first time until August 18, 2020, with no explanation or public discussion.

Stakeholders – and the Commission itself – cannot have meaningful deliberations about requirements of this magnitude without ample time to review the potential implications of the proposed text. The scope of the suggested revisions warrants careful and measured consideration through a transparent rulemaking process. That is simply not possible under the schedule the Commission has proposed for adoption of the Proposed Amendments to the RPS Regulation. NCPA urges the Commission to reject the suggested changes in the *Second 15-day Language* and proceed with adoption of the Proposed Amendments as discussed herein.

B. The Commission's Review of Compliance with PUC Section 399.13(b) Should be Focused on the Duration of the Agreement or Ownership Interest

The Commission has the responsibility to review POU contracts for compliance with the RPS program mandates. For purposes of determining whether a contract or agreement meets the requirements of PUC section 399.13(b), the Commission must look at the *duration* of the agreement. Under the RPS Regulation, POUs submit compliance reports to the Commission wherein the Commission determines whether the POUs have complied with the different mandatory elements of the RPS program. For example, as part of that compliance determination the Commission properly reviews delivery terms and quantities to determine whether the POU has met the total portfolio procurement and portfolio balancing requirements. However, that determination is separate and apart from any determination of whether the underlying agreement meets the separate, minimum 10-year duration requirement to be an eligible long-term agreement.

1. <u>The Second 15-day Language Includes Provisions that Exceed the Regulation's Own Definition of Long-Term Contracts.</u>

The Proposed Amendments will implement the provisions of Public Utilities Code section 399.13(b) and 399.30(d)(1). PUC section 399.13(b) provides, in pertinent part:

> "Beginning January 1, 2021, at least 65 percent of the procurement a retail seller counts toward the renewables portfolio standard requirement of each compliance period shall be from its contracts of 10 years or more in duration or in its ownership or ownership agreements for eligible renewable energy resources."

The Proposed Regulations adds a new definition to address this requirement:

> Section 3201(r): "Long-term procurement requirement" refers to the minimum amount of procurement from contracts of 10 years or more in duration, ownership, or ownership agreements, required by Public Utilities Code section 399.13 (b).

And the *Second 15-Day Language* further refines the Proposed Amendments to provide that:

> "A long-term contract is defined as a POU's contract to procure electricity products from an RPS-certified facility for a duration of at least 10 continuous years…."

In order to ensure that a contract that is counted towards the 65% long-term requirement is for a duration of 10 years or more, the Commission must be able to review the duration of the contract. The statute does not address any other contract terms that are necessary or relevant; as such, neither should the Commission's review of whether a contract or ownership agreement is deemed long-term. While it is clearly necessary for the Commission to be able to review POU RPS-eligible contracts for compliance with the various RPS provisions – including the long-term procurement requirements mandated by PUC Section 399.13(b) – the Proposed Regulation released in May includes adequate provisions for the Commission to conduct such a review and make a timely determination without the inclusion of proposed requirements set forth in the *Second 15-day Language*.

2. The RPS Regulation Would Include Duplicative and Unnecessary Contract and Compliance Reviews

The Proposed Regulations includes no less than seven separate references to the ability to collect supporting information. The sections newly added by the *Second 15-day Language* are unnecessary for the Commission to review a contract for compliance with PUC section 399.13(b). As currently proposed, the RPS Regulation would include all of the following:

- New Section 3204(d)(2)(A)3. (Second 15-day language): "A POU may be required to provide additional information to the Commission, as provided in section 3207(c)(5), to demonstrate that a long-term contract represents a long-term procurement commitment with an RPS-certified facility consistent with Public Utilities Code section 399.13(b), including information that demonstrates . . ..

- New Section 3207(c)(2)(E) (Proposed Amendments): "An initial, nonbinding classification of retired electricity products qualifying as long-term or short-term in accordance with section 3204(d)."

- Modified Section 3207(c)(2)(F) (Proposed Amendments): Information for each contract or ownership agreement executed during the prior year, "including … the duration of the procurement contract or ownership agreement in accordance with section 3204(d); … the anticipated long-term or short-term classification for the electricity product procured through the contract or ownership agreement…"

- New section 3207(c)(2)(G) (Proposed Amendments): Documentation demonstrating the portfolio content category classification and long-term or short-term classification claimed for all of the POU's procured electricity products during the prior year…"

- New section 3207(c)(2)(H) (Second 15-day language): "An explanation of any modifications to long-term contracts, ownership, or ownership agreements from which a POU intends to claim long-term procurement, including, but not limited to, changes to contract duration, procurement quantities, addition or substitution of resources or fuel, reallocation between parties of a jointly negotiated contact, and efficiency improvements or facility expansions that change procured generation. The POU's explanation shall include documentation supporting modifications."

- New Section 3207(c)(5) (Second 15-day language): "Review of long-term contracts"

  (A) Following the submittal of annual reports specified in section 3207 (c), Commission staff shall review each contract identified as long-term with the supporting information submitted in the annual report to determine if the contract provides a long-term procurement commitment as required by section 3204 (d)(2)(A). The review will consider, but is not limited to, the following:

  1. Consistency of quantities and deliveries specified in the contract. The POU may be required to explain contract provisions specifying procurement quantities that vary over the term of the contract and provide additional justification demonstrating that the contract provides a long-term procurement commitment consistent with the purposes of the long-term procurement requirement.

  2. Completeness and specificity of procurement terms. The POU may be required to provide additional explanation for any quantity, term or delivery provisions that are not clearly defined or are subject to renegotiation prior to the end of the contract term.

  3. Identification of RPS-certified facilities supplying electricity products in the contract.

4. Anticipated portfolio content category classification or designation as meeting the criteria of section 3202 (a)(2) for electricity products procured through the contract.

(B) Commission staff may request additional information and documentation as needed to complete its review.

(C) Upon completion of its review, Commission staff shall notify the POU of its determination whether the contract meets the definition of a long-term contract based on the submitted information.

(D) A contract that Commission staff determines is not consistent with the definition of a long-term contract shall be classified as a short-term contract for purposes of assessing a POU's compliance with the long-term procurement requirement.

(E) A POU may request the Commission to reconsider staff's determination that its contract does not meet the definition of a long-term contract by filing a petition for reconsideration to the Commission within 30 calendar days of issuance of the determination. The petition for reconsideration shall be filed and processed in a manner consistent with a request for investigation pursuant to sections 1231 – 1232.5.

(F) A POU's procurement claims for electricity products procured through a contract that is determined to meet the definition of a long-term contract shall be subject to verification by the Commission.

- New Section 3207(o) (Second 15-day language): "In additional to applicable reporting requirements in section 3207 (a) – (d), by April 1, 2021, a POU shall notify the Commission of any contracts, ownership, or ownership agreements reported for previous years in accordance with section 3207(c) and from which the POU intends to claim long-term procurement to satisfy the requirements of section 3204(d) for the compliance period beginning January 1, 2021. If needed by Commission staff to make a contract classification determination, a POU may be required to submit additional documentation to show a contract, ownership, or ownership agreement meets the requirements to be classified as long-term."

Not all of the listed information set forth in the *Second 15-day Language* that the Commission "may" review in making its determination of whether the contact is for a duration of at least 10 years is germane to making that determination. To the extent that the provisions set forth in the *Second 15-day Language* seek anything other than information on the duration of the agreement to make a determination of long-term eligibility, they must be rejected.

C. Section 3204(d)(2)(A)3. and Section 3207(c)(5)(A)1. and 2. Are Unlawful

Regulations must "carry out the provisions of the statute," and unless a regulation is consistent and not in conflict with the statute, and reasonably necessary to effectuate the purpose of the statute, it is not valid.[3] The proposed changes in sections 3204(d)(2)(A)3. and section 3207(c)(5)(A)1. and 2. do not meet this standard, and are therefore unlawful. The Commission must adhere to the requirements of the Administrative Procedures Act (APA) in developing regulations. The APA requires regulations to meet certain standards, among them is "clarity";[4] "'Clarity' means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them."[5] As proposed, it would be impossible for POUs and other stakeholders to know or understand the regulations that would directly affect them.

The proposed changes included in the *Second 15-day Language* go well beyond what is needed to determine the *duration* of the agreement, and would give the Commission and reviewing staff the authority to impose additional conditions on POU long-term contracts, without any defined guidance or standards. The discretion afforded to the Commission to make an eligibility determination allows the Commission to make subjective, after-the-fact determinations about a POU's contracts. The Commission cannot lawfully create a review process that would allow staff discretion to impose its own interpretation of information it deems relevant to determining whether the agreement constitutes a long-term commitment. It would be an unconstitutional delegation of authority for the legislature to leave resolution of fundamental policy issues to the Commission; the information the CEC "may" require the POU to provide to make its determination would fall into this category.[6] This lack of clarity could subject different POUs to different standards, depending on the reviewing staff.[7]

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[3] Government Code 11342.2

[4] Government Code 11349.1

[5] Government Code 11349(c)

[6] *See Wilkinson v. Madera Community Hospital, 144 Cal.App.3d 436 (1983)*

[7] *See* Joint POU Comments on 2nd 15-Day Language, Section II.E.

1. Section 3204(d)(2)(A)3 – Is Not Authorized by Statute

Under the second 15-day changes, a POU may be required to provide additional information "to demonstrate that a long-term contract represents a long-term procurement commitment…including information that demonstrates how the long-term contract supports the financing and development of new eligible renewable energy resources, major capital investments in existing eligible renewable energy resources, or long-term planning and market stability." (Second 15-day Language section 3204(d)(2)(A)3.) There is nothing in the authorizing legislation that would require a POU's long-term contracts to demonstrate that the contracts support "market stability." The POU's obligation is to serve load and not worry about how well project developers are doing financially. Any consideration of such information in a determination of a long-term contract would be arbitrary and capricious. Additionally, as proposed, the RPS Regulation would be devoid of any guidance or parameters that would allow the POUs to understand exactly what is necessary to make such a demonstration. Further, whether a contract supports "financing and development of new eligible renewable energy resources, major capital investments in existing renewable energy resources, or long-term planning and market stability," for example, is not relevant to determining whether the agreement is for a duration of at least 10-years. The Commission must reject this extra statutory requirement.

2. Section 3207(c)(5)(A)2. is Not Authorized by Statute

The requirements in 3207(c)(5) to provide additional explanations for various contract terms is unlawful, vague and ambiguous. For example, the Commission may ask a POU to "explain contract provisions specifying procurement quantities that vary over time and provide additional justification demonstrating that the contract provides a long-term procurement commitment." The mandate for long-term contracts in section 399.13(b) does not include any requirements related to minimum "expected quantities" or specified pricing conditions in order to be deemed long term. While some parties have expressed concerns about "sham" contracts, ostensibly due to a lack of subjective pricing or delivery terms that would meet their objectives, this was not a concern of the legislature, or the long-term contract requirements articulated in section 399.13(b) would have included a reference to more than just the duration of the agreement. Further, no such discussion was even addressed in the Initial Statement of Reasons

(ISOR). Any discussion of specific delivery quantities or pricing provisions, for example, should at a minimum have been raised in the ISOR to inform stakeholder discussion. Instead, without any statutory direction or analysis in the ISOR regarding what kinds of delivery and pricing terms may be needed "acceptable," the *Second 15-day Language* would add an "catch-all" provision that allows the Commission to make this determination based solely on its own discretion.

There is nothing in the statute that mandates any specific procurement quantities over the term of the agreement, nor prohibiting any variations in procurement quantities over the duration of the agreement. Simply put, there is no authorization for the Commission to require a POU "to explain contract provisions specifying procurement quantities that vary over the term of the contract," or "provide additional justification demonstrating that the contract provides a long-term procurement commitment." Indeed, without a clearly defined statutory mandate regarding "consistency of quantities and deliveries specified in the contract," a POU would be forced to make a demonstration upon which there is not objective standard to be applied. The Commission's determination would be arbitrary and capricious, and based on the subjective determination of the individual reviewer. This puts the POUs – and indeed the entire market – in the untenable position of having contracts second-guessed and subject to after-the-fact mandates neither envisioned, nor authorized by the legislature. Neither the enabling legislation, nor the proposed amendments themselves include requirements regarding specific procurement quantities over time. It is arbitrary for the Commission to review and assess "contract deliveries" provisions in the context of making a determination on the <u>duration</u> on a long-term procurement commitment.[8]

3. <u>The Second 15-Day Language Would Unlawfully Require POUs to Demonstrate the Intent of Their Long-Term Contracts</u>

In determining whether the contracts are for a <u>duration</u> of 10 years or more, the Commission need not review the specific terms and conditions associated with the procurement quantities or delivery terms. While the final quantities delivered and portfolio content category

[8] The fact that the Commission may – but does not mandate – that the POUs provide information regarding these provisions is does nothing to render the provision valid, since the *Second-15 day Language* clearly states that the Commission's review "**will** consider, but is not limited to, the following: 1. Consistency of quantities and deliveries specified in the contract…." (emphasis added)

must be verified to for purposes of making a final determination of RPS compliance, they are not relevant to a determination of whether the underlying contract at issue is qualified as a long-term agreement.

Likewise, the Commission does not have the authority to make a determination on the duration of a contract by looking at the parties' intent. Nothing in the statute implies that the Commission can review the types of contract provisions called out in 3207(c)(5)(A)2, or 3204(d)(2)(A)3, for example. Nowhere, does the legislature provide the Commission with the authority to make a policy determination that the POU's long-term contracts demonstrate, among other things, that it supports major capital investments in existing eligible renewable energy resources. In fact, despite extensive legislative debate about the various RPS mandates, including the discussions leading up to the addition of the long-term contacting requirement, there is no history or record of any of the items referenced in proposed section 3204(d)(2)(A).3.[9]

D. The Regulation Must Clarify Applicable Standards

Assuming, *arguendo*, that the enabling legislation did delegate to the Commission the authority to make a determination of whether a contract qualifies as "long-term" by looking at anything other than the duration itself, the regulation, as proposed, is completely devoid of any provisions that definitively identify or define those terms. As proposed, the *Second 15-day Language* unlawfully delegates statutory authority to the Commission and staff making the "determination" of whether a contract qualifies as long-term by reviewing arbitrary provisions not found in the statute or regulation. Had the statute provided the Commission with authority to impose additional contract provisions, those provisions would have to be clearly defined in the regulation itself. As it is, not only is the enabling legislation devoid of any reference or standard for how a POU would demonstrate that its long-term contract supports investments in new resources or market stability, or what variations of procurement quantities over time may be acceptable, but so is the regulation itself.

If in fact the Commission had the authority to include these requirements, the APA still requires that such information be defined in the regulation to provide affected entities the clarity needed to ensure they can comply; in this case, they are not. The proposed changes would allow

[9] *See* Joint POU Comments on 2nd 15-day Language, Section II.D.

the Commission to review – and pass judgment on the sufficiency – of a long-term agreement by looking at provisions beyond the *actual term of the agreement*, all without giving any guidance on what acceptable provisions would be, or how the Commission would determine what is "acceptable." The legislation mandates contracts for 10 years or longer; the legislation **does not** mandate specific delivery quantities, or delivery terms for those long-term agreements. Neither does the proposed regulation articulate what sufficient delivery quantities would be. Renewable energy contracts include many different business terms and conditions, including pricing and delivery terms. Pricing and deliver terms may vary over the duration of a contract based on the needs of the POU and the specifics of a particular resource. A POUs' load and resource needs are not necessarily going to remain static, and it is important for the POU to be able to procure renewable energy resources in a manner that best meets the needs of their customers in the most cost-effective manner possible. Likewise, renewable projects may be developed with long-term commitments from more than one counter-party, and the ability to craft contracts and agreement that meet the needs of the developer and the various counter-parties is going to be an important part of the development process. It is this flexibility that helps ensure the success of the projects.

Had such specific terms or provisions been addressed by the stakeholders as part of the rulemaking process, it would have afforded stakeholders the opportunity to comment and provide evidence on any such specific provisions, and supporting rationale would have been addressed in the ISOR. As noted above, this issue was not even raised in the ISOR. Instead, in the absence of any such delegation of authority in the legislation or clear articulation in the regulation, the Commission gives itself – and reviewing staff – the authority to impose their own independent judgment on the sufficiency of a long-term agreement. Doing so is unlawful and would supplant Commission staff's independent judgement for that of the local elected officials that approved the agreements.

Furthermore, should the Commission deem it appropriate for the regulation to define the parameters of the POU's contract that would be acceptable – or unacceptable – relative to contract pricing and delivery terms over the duration of the agreement, those parameters must be clearly defined and developed as part of a transparent and deliberative rulemaking process with ample and meaningful opportunity for stakeholder input. There is nothing in the Proposed Amendments or *Second 15-day Language* that identifies *what* contract provisions would be

subject to further scrutiny by the Commission. Discussion and deliberation of these kinds of regulatory provisions warrant careful deliberation and consideration by the Commission and stakeholders, which cannot meaningfully be carried out in a 15-day comment period.

Neither would it be lawful for the Commission to approve the scope of review set forth in the *Second 15-day Language* now and direct a future rulemaking to fully define and address the specific provision at issue. First of all, any long-term contract review conducted between the effective date of the current amendments and the completion of a subsequent rulemaking to develop necessary definitions would result in underground regulations, and subject the POUs to arbitrary and capricious mandates defined only by the staff conducting the review. Secondly, as demonstrated by the duration of the current rulemaking, an entirely new rulemaking process could take years to complete, during which time POUs will be entering into long-term commitments necessary to meet the 65% long-term mandate. The uncertainty surrounding the sufficiency of those agreements would be harmful to the POUs and the market, and puts the POUs at risk of noncompliance. The only remedy is for the Commission to reject the proposal in the *Second 15-day Language.* Any further deliberation of into whether the agency has the authority to review and approve additional contract conditions for purposes of making a determination of whether a contract qualifies as a long-term commitment is necessary should be taken up in its entirety as part of a new rulemaking.

E. The Commission Should Have Clearly Defined Timelines Surrounding its Determination of Long-Term Eligibility

While Section 3207(c)(2) already includes provisions regarding materials relevant to long-term contracts, newly added 3207(c)(5) would add a new provision specific to the long-term contracts. As mentioned above, some of the data points that the Commission "*will consider, but is not limited to*" considering are arbitrary and capricious and should be removed. Remaining provisions related to the review of the agreements for a determination that they are long-term eligible should be revised to include definitive timelines for Commission responses. POUs must be able to plan for renewable procurement in a manner that meets all of the various RPS mandates, including the separate 65% long-term requirement. The long-term contract provisions were adopted by the legislature years ago, and a POU could elect to apply them to the current compliance period. Even without the election of early compliance, the provisions are

mandatory beginning in 2021, which means the POUs have already been working with market participants and project developers in planning for this long-term generation. The Commission's proposed review process would create considerable uncertainty with regard to contracts already approved by local governing boards and for agreements currently under development. Without clearly articulated timelines for a Commission determination, POUs would be at jeopardy of noncompliance should the Commission make an untimely ineligible determination.

The current compliance filing review and approval process is already considerably long. Waiting until the end of that process to notify a POU that the Commission had determined that a contract is not long-term eligible could force a POU out of compliance and subject the POU to considerable penalties.

NCPA suggest the following to remove this uncertainty: The Commission should define the time-period for making a determination regarding the long-term eligibility of any new or amendments contracts to a period of no greater than 30 calendar days after the submittal of an annual report by the POU. Should the Commission not provide an affirmative determination within 30 days of submitting the report, all long-term contracts identified therein would be deemed long-term eligible. This should apply to the provisions in sections 3207(c)(2)(H): regarding modifications to long-term contracts; section 3207(c)(5)(C) and (D); and section 3207(o): regarding April 1, 2021 requirement to submit long-term contracts reported from previous years.

F. The Commission Must Timely Confirm Ongoing Contract Eligibility

The long-term contracting requirement will comprise a majority of the POUs' electricity portfolio, impacting both short-range and long-range integrated resource planning. Once a POU enters into a long-term agreement that will be used to meet the 65% mandate, the utility must be able to plan and administer their remaining procurement obligations to meet the demands of their customers and ensure that statutory mandates are met. This simply cannot be done in an environment where the Commission may review and re-review POU long-term contracts to make a determination of whether those contracts meet some arbitrary undefined and unrelated "requirement." Indeed, as proposed in the *Second 15-day Language* a POU would not even

know with any certainty what contract changes the Commission would deem a "trigger" to additional review.

While it is appropriate for the Commission to require POUs to submit documentation regarding long-term contracts executed during the prior year, that review must be necessarily limited to a determination of whether the contract is for a duration of 10 years or more. The Commission must strike the unlawful review of provisions outside that scope as noted above. Furthermore, the annual report's review of any long-term agreements that were amended or modified during the prior year must likewise be limited to just those provisions in section 3204(d) that alter the duration of an agreement. And, as noted above, the Commission's review and determination of eligibility must be limited to a reasonable time.

The Commission must confirm that once it has been determined that the agreement is qualified as a long-term contract, amendments or modifications to pricing or delivery provisions do not alter the long-term eligibility. Absent a contract amendment or modification that impacts provisions in section 3204(d) that change the duration of an agreement, the long-term eligibility of the contract should not be subject to any further Commission review. The Commission should also affirm that any contracts that are grandfathered under the state's RPS program (pre-June 2010) are deemed to be long-term agreements. In the utility's annual report, the authorized representative can attest that no changes have been made to the agreements.

G. The Proposed Changes Fail to Properly Implement PUC Section 399.33

NCPA urges the Commission to correct the proposed amendments to properly implement the provisions of PUC section 399.33. SB 1110 was narrowly and specifically crafted in acknowledgment of the fact it may be necessary for Roseville and Redding to "modestly adjust" their generation to protect the public agency bond holders, as well as retain jobs in the local communities, from the construction debt of certain power plants built in response to the energy crisis.[10] As noted in NCPA's June 22, 2020 Comments on the Proposed Modifications and August 5, 2020 Comments on the First 15-Day Language,[11] the legislative intent behind this provision must be reflected in the regulation.

[10] See NCPA June 22 comments, p. 6 and Attachment A, Fact Sheet, Senate Bill 1110 (Stats. 2018, ch. 605), Senator Steven Bradford, 2018.

[11] NCPA June 22 Comments;

The provisions of SB 1110 apply to plants owned by just two POUs, which plants reflect public investments in reliable electricity in response to the power crisis that caused widespread outages and economic harm. These plants were able to provide that much needed reliability to Roseville and Redding during the recent heatwave. For example, the City of Redding, located in the Balancing Authority of Northern California (BANC), was able to provide 5-70 megawatts of power to the CAISO during most hours of the Stage 2 and Stage 3 events.[12]. Because the impacted facility was available, Redding did not have to utilize backup generation during the heatwave. Redding was also able to ensure an uninterrupted power supply to the CalFire Northern Operations Headquarters that provides critical air support for wildfire suppression. Roseville Electric, also in the BANC footprint, provided uninterrupted power with its gas-fired power plant playing a crucial role in maintaining reliability for its customers.

The facilities that provided this critical support however, may not operate at 80% at all times, and it is just that eventuality that SB 1110 was intended to address. If operating the plants below the threshold results in the need to shutter the plants, not only would the public investment be compromised and jobs lost, but these resources would not be available to provide support during the generation shortages like those the state recently experienced. The 20% threshold protection set forth in PUC section 399.33 is intended to ensure this does not happen by allowing the POUs to "modestly adjust" their RPS procurement to reflect the performance of the plant on an annual basis.

NCPA urges the Commission to correct this shortcoming and *issue proposed amendments that reflect the following language*:

> 3204 (b) (11) (B) The qualifying gas-fired power plant must be operating at or below a 20 percent capacity factor on an annual average basis during ~~each~~ any year of a ~~the~~ compliance period in order to reduce the RPS procurement target for the compliance period.[13]

file:///C:/Users/CSB/Downloads/TN233600_20200622T164909_Northern%20California%20Power%20%20Agency%20Comments%20-%20on%20RPS%20Proposed%20Amendments.pdf; August 5, 2020 Comments: file:///C:/Users/CSB/Downloads/TN234234_20200805T155129_Northern%20California%20Power%20%20Agency%20Comments%20-%20NCPA%20Comments%20on%2015-day%20Change.pdf.

[12] The actual amounts of power varied depending on the hour and availability of Redding's resource mix.

[13] Consistent with this correction, sections 3204(b)(11)(B)(1) and 3204(11)(F) would also need to be revised accordingly.

IV. CONCLUSION

The proposed changes set forth in the *Second 15-day Language* are extremely problematic and warrant careful and meaningful consideration. These substantive and extra-statutory provisions have been included at the end of a years-long rulemaking process, denying stakeholders the opportunity to meaningfully review the provisions and their implications. NCPA urges the Commission to remove the provisions of Section 3204(d)(2)(A)3. and 3207(c)(5)(A)1. and 2, and to make the necessary corrections and refinements to the remaining provisions as addressed herein and in the Joint POU Comments. The Commission should also modify the proposed amendments to correctly implement the provisions of PUC section 399.33 as discussed above. Please do not hesitate to contact the undersigned or Scott Tomashefsky at 916-781-4291 or scott.tomashefsky@ncpa.com with any questions.

Dated September 2, 2020.

Respectfully submitted,

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